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Private Rights and Public Regulation – Civil Liability and the 'Permit Defence'

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This short chapter concerns a deceptively simple issue – if a state authorizes an activity, does that authority absolve the operator of legal liability for any damage that his authorized activity might cause? On one view, it seems contrary to find that a lawful activity is unlawful. But the issue is not so simple. What the state might authorize as lawful for a regulatory purpose might still have effects on third parties and impact on their legal rights. The issue above is deceptively simple because it concerns different layers of law within a legal system, regulating different things – industrial or other environmentally impactful activity, on the one hand, and individual rights not to suffer harm, on the other. Reconciling these layers can be understood in different ways: as an accommodation of public law and private law rights; as concerning the scope of regulatory authority; as a constitutional balancing of administrative and judicial controls; as a competition between community-based activity and individual property rights; as a means of seeking environmental protection through private rights; or as a conflict of legal priorities and norms in an era of increasing regulation and control over land use. This chapter addresses this multi-faceted issue by focusing on the regulation of polluting activities and the rights of neighbouring (or otherwise affected) third parties to enjoy their land. It shows that, on a comparative analysis amongst EU Member States, there is no simple answer to the issue above. In some cases, individual rights to enjoy property can still be asserted against operators who are carrying on lawfully sanctioned activities. In other cases, operational permits seem to close down any rights of neighbouring property

right holders to complain about damage caused to their land. In all cases, however, there is a difficult legal issue that reflects a fundamental challenge to individual property rights posed by the modern administrative state and the extensive state environmental controls that now exist across the EU. The different legal approaches adopted by Member States to this challenge reflect not only divergent legal choices over whether public law or private rights take priority, but also different understandings about the nature and role of property rights in an era of extensive land use regulation.

No Permit Defence to Third Party Liability of Regulated Entities

To illustrate the legal question at issue, consider the following problem. A communal waste disposal site is located not far away from individual residential houses. Inhabitants claim that they smell bad odour due to the operation of the landfill and that the enjoyment of their land has been seriously compromised. Some would like to sell their property, but there are no potential buyers and their property is almost worthless. The waste disposal site is equipped with the necessary permits and is operating within the permitted odour limits. In most, if not all, EU member states, there is a legal cause of action available to individual property right holders for an actionable 'nuisance' caused by a neighbouring property that is impacting on the enjoyment of their land, including through foul smells.[1] The question here is whether this cause of action might be defended successfully by an defendant, such as the landfill operator in this example, who has a permit to carry on the activities that are causing the bad odour experienced in neighbouring properties. In some EU Member States, the answer is 'no'. There is no 'permit defence' available to regulated

[1] This is a form of civil or tort law liability in most EU Member States applying nuisance law, a duty of care or other 'neighbouring law principles'; or statutory liability in others (such as under the Norwegian Neighbouring Properties Act (1961)).

operators who are causing a civil law nuisance, which impacts on the amenity and value of neighbouring properties. Whilst this approach seems to give priority to individual property rights over environmental regulation, a closer look at some of the legal positions in Member States shows that this position is not so clear cut.

In at least the following Member States, an individual landowner can bring a civil law action in relation to an alleged nuisance that is otherwise allowed by a regulatory permit: Belgium, Croatia, Czech Republic, Denmark, France, Norway, Slovenia and the United Kingdom. A strong statement defending private law rights in this situation can be found in English case law, in the judgment of Lord Justice Carnwath (as he then was) in *Barr v Biffa Waste*.[2] This was a case with very similar facts to the above scenario, involving a waste processing operation that caused odour problems for neighbouring residences, and the English Court of Appeal found that the neighbouring properties were entitled to bring a claim in nuisance. Carnwath LJ stated:[3]

> The common law of nuisance has co-existed with statutory controls, albeit less sophisticated, since the 19th century. There is no principle that the common law should 'march with' a statutory scheme covering similar subject-matter. Short of express or implied statutory authority to commit a nuisance…, there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights.

Even more explicitly, Belgian regional legislation concerning environmental permits provides that a regulatory permit has no influence on the rights of third parties.[4] Civil liability can thus arise even when an operator is acting completely in conformity with the conditions of its environmental permit.[5] In Denmark, the position is so protective

[2] *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312; [2013] QB 455.
[3] Ibid [46].
[4] E.g. Art 8 Decree of the Flemish Region of 28 June 1985 concerning the environmental permit; Art 49 of the Decree of the Walloon Region of 11 March 1999 concerning the environmental permit.
[5] A. Van Oevelen, 'Civielrechtelijke aansprakelijkheid voor milieuschade', in Centrum voor Beroepsvervolmaking in de Rechten – UIA, *Rechtspraktijk en milieubescherming. Antwerps Juristencongres 1991* (Kluwer rechtswetenschappen 1991) 139.

of neighbours' rights that some scholars argue that the creation of nuisance should be considered an expropriation of their property rights.[6]

However, the picture is not so simple as finding that no permit defence exists in most Member States. There is often not a clear priority given to private rights over public regulation. There are at least two ways in which a defendant's compliance with a regulatory permit may still affect any civil liability owed to third parties. First, the conditions of the permit might impact on a finding of liability in the first place. Second, compliance with a permit might affect the remedy available in any third party claim.

These two qualifications can be seen in the recent UK Supreme Court decision in *Coventry v Lawrence*,[7] which concerned an alleged noise nuisance caused by a motor racing track in a rural neighbourhood. As in *Barr v Biffa Waste*, the outcome of the case supported the right of the neighbouring residential property to bring a claim in nuisance. However, the reasoning of the Supreme Court grappled with the interplay of private law rights and public law regulation in more depth, and found that the planning permission for the motor track to operate (with certain consequential noise in the vicinity) could be relevant to the nuisance claim in the two ways indicated above. First, the lead judgment of Lord Neuberger suggested that the conditions of the regulatory permit concerning acceptable noise levels might be relevant 'evidence' as to what was an unacceptable level of noise in the area and thus an actionable nuisance in the first place.[8] The reasoning here is intricate but it shows that the existence of a permit to operate complicates, and in some cases might undermine, any finding that

[6] See Danish report #
[7] [2014] UKSC 13 ('*Coventry*').
[8] Ibid [96]. See also Lord Carnwath's separate judgment at [218].

the use of land by the defendant is 'unreasonable'.[9] Nuisance liability can also be affected by compliance with a regulatory permit where the regulated operations were established before the aggrieved neighbour moved into the area and became affected by the polluting activities of the permit holder. This is the position in French law, where the principle of 'pre-occupation' means that a private landowner cannot resort to a private law nuisance action in order to get injunctive relief or even compensation for environmental damage, if polluting activities on neighbouring lands took place in the area before the landowner settled there and were in compliance with relevant permits.[10]

Second, the majority of the court in *Coventry v Lawrence* supported the view that remedies available to the claimant would be influenced by the track's permit to operate.[11] Rather than an injunction being available to stop the noise nuisance (as is the common remedy for actionable nuisances in English law), some members of the Court suggested that compensation should be the proper remedy in this case, in light of the defendant's permit to operate.[12] This is a common position in other Member States. In Croatian law, for example, if damage to third parties results from a defendant performing an activity in the public interest for which an approval has been obtained from a competent authority, only compensation for the damage may be required. The position is similar in Denmark, Norway and Slovenia.[13] The existence

[9] As is required to establish nuisance liability in English law.
[10] See French report #. Cf UK law where 'coming to the nuisance' has not been a valid defence in nuisance law, although there might be some scope to challenge this position after *Coventry v Lawrence:* n (7)[53].
[11] *Coventry* (n 7) [125] (Lord Neuberger), [161] (Lord Sumption), [169] (Lord Clarke), [246] (Lord Carnwath).
[12] Ibid. See the judgments of Lords Neuberger and Sumption in particular (cf Lords Carnwath and Clarke). For further analysis on these points in the Supreme Court's judgment, see Maria Lee, 'Private Nuisance in the Supreme Court: *Coventry v Lawrence*' (2014) 7 *Journal of Planning and Environmental Law* 705.
[13] Although in Slovenian law, measures to limit adverse impacts can be required as well as compensation. Notably this position has changed in Belgian law. Whilst previously a court could only

of liability to a third party thus does not necessarily stop the permitted activities of a regulated operator. Rather, through civil law obligations leading only to a compensatory remedy, there is a legal accounting for the externalities caused by a regulated entity's operations. This adds a legal obligation and cost for their business, but does not undermine or negate their lawful permission to operate.

This more nuanced reasoning shows that private law property rights, whilst they might be asserted against regulated entities, still exist within a regulatory context of land use control and are affected by that context. They are not absolute rights to the enjoyment of land that trump regulatory permissions. Findings of civil liability may be partly determined by how regulatory decisions have accommodated and balanced the interests of neighbouring properties within a particular area.[14] Having said that, rights to bring claims in nuisance or other civil law obligations remain significant legal rights where they can be asserted against operators that are subject to regulatory control. The subsistence of these rights can be seen as a continuation of strong historical protection for individual property owners, in that individual rights are not simply subjugated to the community interest as this is taken into account in setting permit conditions to control the polluting impacts of a regulated installation. However, private rights do not need to be set against public entitlements. Civil law rights of individual property owners can also be seen as complementing public control

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order an operator causing damage to compensate a third party financially, this approach has been abandoned since a judgment of the Supreme Court of 26 June 1980, in which the Court held that ordering the reparation in kind was not incompatible with the separation of powers: Van Oevelen (n 5) 151-154; H. Bocken, 'Aansprakelijkheid voor schade veroorzaakt door milieuverontreiniging naar Belgisch recht' in H. Bocken and D. Ryckbost (eds), *Verzekering van Milieuschade/ L'assurance des dommages causés par la pollution/Insurance of Environmental Damage* (E Story-Scientia 1991) 63; H. Bocken, D. Ryckbost and S. Deloddere, "Deel 8. Herstel van schade door milieuverontreiniging . Titel 1. Aansprakelijkheid en financiële zekerheden", Interuniversitaire Commissie tot Herziening van het Milieurecht in het Vlaamse Gewest, *Voorontwerp Decreet Milieubeleid* (die Keure, 1995) , 866-867.

[14] Eloise Scotford & Rachael Walsh, 'The Symbiosis of Property and English Environmental Law – Property Rights in a Public Law Context' (2013) 76 (6) *Modern Law Review* 1010. See also Maria Lee, 'Tort Law and Regulation: Planning and Nuisance' [2011] *Journal of Planning Law* 986.

– a form of regulatory back up that act as a second line of defence for environmental protection when regulatory controls do not control polluting impacts adequately. In this way, property rights can be exploited to pursue environmental protection, rather than being restricted or controlled by environmental regulation. By the same token, in cases where there is strong regulatory control limiting the polluting impacts of an installation, the motivation of neighbouring property owners to pursue a liability claim is likely to be minimal, and a finding of liability equally unlikely. The interplay between private and public control of land is thus complex and 'there is no simple hierarchy between [civil law remedies] and different forms of regulation'.[15] Much will depend on the facts of an individual case in determining if and how civil liability will arise in the context of regulatory control.

A Permit Defence to Third Party Liability of Regulated Entities

By contrast with the position set out in the previous section, in some Member States, a 'permit defence' does exist for civil liability claims brought against a regulated entity that is operating within the terms of its permit. This position is found in at least Germany, Italy, Portugal, Spain and Latvia. This legal situation might seem more straightforward than cases where civil liability persists – public controls here simply override private rights. However, again, that characterisation is too crude. This is because most Member States limit the extent of any permit defence and, in some cases, allow third parties to challenge the content of any permit or to claim compensation in certain circumstances if there are adverse impacts on neighbouring properties. The common legal theme, where a permit defence against civil liability exists, is that the administrative law sphere is the primary legal sphere for controlling

[15] Maria Lee 'Safety, Regulation and Tort: Fault in Context' (2011) 74(4) MLR 555, 556. For more on the complex interplay of regulation and individual rights protected through private law in the UK, see Lee, ibid.

polluting emissions from land use, including their impacts on the amenity of neighbouring properties.

In those Member States where a permit defence applies, the basic concept is that a claim in nuisance (or some other form of civil liability between neighbours) will fail if the defendant is a regulated entity that is operating in accordance with the conditions of its permit in causing the alleged polluting harm. This is usually quite a strict defence. The Spanish position is representative – the defence will operate if the emissions that directly caused the relevant environmental damage fall within the express and specific purpose of an administrative authorisation. However, the defence will not operate where the emissions are due to actions that fall outside the terms of any permit; where there is some legal fault on the part of the defendant;[16] where there has been a criminal violation of public health or environmental law;[17] or, in Latvia at least, where the damage results from a 'high risk source'.[18]

The main concern of the permit defence that applies in these Member States is the robust regulation and control of any polluting emissions, rather than prioritising the interests of affected individuals (whether through the payment of compensation or injunctive relief to require cessation of regulated operations). In this way, a permit defence does not act as a shield to protect the emission of pollutants where these are excessive and not being properly regulated. The key difference from those Member States where civil liability persists is that any legal action brought by neighbouring properties in relation to offending pollution would be through administrative law or the regulatory system, not civil law. German law provides a good example of this

[16] Presumably this would be some form of negligence or intentional fault on the part of a defendant, even if the relevant polluting emissions do not strictly contravene permit limits.
[17] See Italian report #
[18] See Latvia report #.

model. In Germany, an affected neighbour might ask for technical improvements to the operations of an excessively polluting installation in line with 'best available techniques' where this is economically feasible.[19] The neighbour might also, under administrative law, ask the competent regulatory body to modify the permit and order the operator to improve the installation if it causes emissions having adverse effects on his/her health.[20] In other Member States, the position is similar – as a matter of legal doctrine, any permit allowing the offending emissions would need to be amended in the first instance, or lifted before a civil claim for damages could be brought. In addition, there might be other regulatory controls that require the operator of a polluting facility (even if operating within the terms of its permit) to remedy any damage caused by its operations.[21]

This state of affairs shows that the existence of a permit defence is not a blanket defence that insulates regulated entities from the consequences of their polluting activities once and for all after they have been granted a permit for their activities. Rather, in these Member States, the dominant sphere of legal control is different. It is the regulatory system and public law that aggrieved property owners affected by the polluting emissions of a regulated installation must rely on. Again, as in the case of civil liability claims, there is no absolute right of property owners to be protected from pollution or environmental damage, however any excessive harm or

[19] BImSchG, art 14. Similarly, in Latvian law, a regulated entity could under obligations to act to prevent ongoing environmental damage to neighbouring properties, even though not civilly liable to pay the owners any compensation: see Latvian report #.

[20] See German report #. Notably, compensation might still be payable in cases where an adverse interference with the rights of neighbouring properties is significant and sufficiently serious (that is, it is more serious than what is customary in the location). In this case, compensation will only be payable where preventive measures to deal with the adverse impact are too costly.

[21] This is the position in Spain, where regulated entities are obliged at all times to adopt the measures of prevention, avoidance and remediation of environmental damage. However operators can recover the costs of such measures where they were complying with a permit and the damage was damage was caused by an activity that at the time it was being carried out was not regarded as potentially harmful according to the state of with scientific and technical knowledge: Article 14 of Law 26/2007 on environmental liability.

actual damage is likely to result in regulatory action (either to amend or withdraw the operational permit of a regulated entity).

Conclusion

There are two overall conclusions that can be drawn from the comparative legal analysis of this chapter. First, careful characterisation of the applicable law in different Member States in relation to properties adversely affected by the emissions of a regulated installation shows that the position is more complex than there simply being two divergent approaches, one allowing a claim under civil law and the other not. In both cases, there are avenues of legal recourse for affected individual property owners. However, these avenues are different. In some Member States, private law remedies are important for vindicating individual property rights, whilst in others the public law sphere is the appropriate realm for regulating polluting installations and controlling their impacts. Whether or not this legal situation is by deliberate design in these different legal systems, it reflects varying legal cultures in which overlapping public law and private law rights are differently accommodated. In those states where there is a 'permit defence', the scope of regulatory authority as a source of norms and decision-making in relation to polluting installations is wider and takes priority. As a result, ex ante administrative controls of polluting activities (taking into account their impacts on neighbouring properties) take precedence over ex post judicial decisions concerning the infringement of private rights. In those states where no permit defence applies, individual property rights are protected by strong legal norms against a backdrop of increased regulatory decision-making at a community level. In this latter case, the private and public law layers of control remain distinct, so that individual property rights might be seen as an additional and supporting form of legal control

and environmental protection when private properties are subject to environmental damage. This position reflects a different constitutional balance in relation to the rights of individual property owners, where judicial decision-making remains an important site of legal control.

Second, and as this concluding analysis already suggests, the proper characterisation of legal approaches in these cases is not mere legal semantics. There are doctrinal and practical consequences, and even constitutional dimensions. The predominance of the regulatory system in Member States such as Germany, Italy and Spain reflects a legal culture in which property rights have less priority and are more directly affected and effectively constituted by regulatory decisions over land use. In one sense, this is doctrinally cleaner – the public law sphere is primarily responsible for decision-making and control in relation to land use, which inevitably involves the accommodation of a wide range of interests (including private property interests) in a world of finite land-based resources. At the same time, in these Member States, the responsibility on regulatory authorities to protect the interests of individual property owners in their decision-making is significant, and the risk of regulatory capture or the poor resourcing of regulatory agencies could have serious consequences for individual property owners.

By contrast, in those Member State where civil liability persists irrespective of any regulatory permit possessed by the defendant – such as Belgium, Croatia, France and the United Kingdom – there is a more symbiotic relationship between private rights and public controls in relation to land. Both forms of control over land use respond to one another and arguably keep each other in check.[22] Individual property

[22] Scotford and Walsh (n 14).

rights are an important legal line of defence where regulatory systems might be weak or compromised or too focused on expediency.

In the result, the comparative legal picture of the existence of a 'permit defence' in different EU Member State states shows that this deceptively simple legal question exposes an interesting, and perhaps inevitable, flashpoint in modern regulatory systems where property rights are subject to and affected by environmental controls. Public law and private law systems interact and doctrinally purity is difficult to sustain. The legal resolution of individual claims of civil liability against regulated entities reflects doctrinal choices that do not necessarily limit avenues of legal challenge and appeal for property owners, but which reflect different priorities given to regulatory systems, different constitutional approaches, and different conceptualisations of property rights.